

No 321

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Supreme Court of the United States

OCTOBER TERM, 1943.

THE NORSTRAND CORPORATION and
LEIF NORSTRAND,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

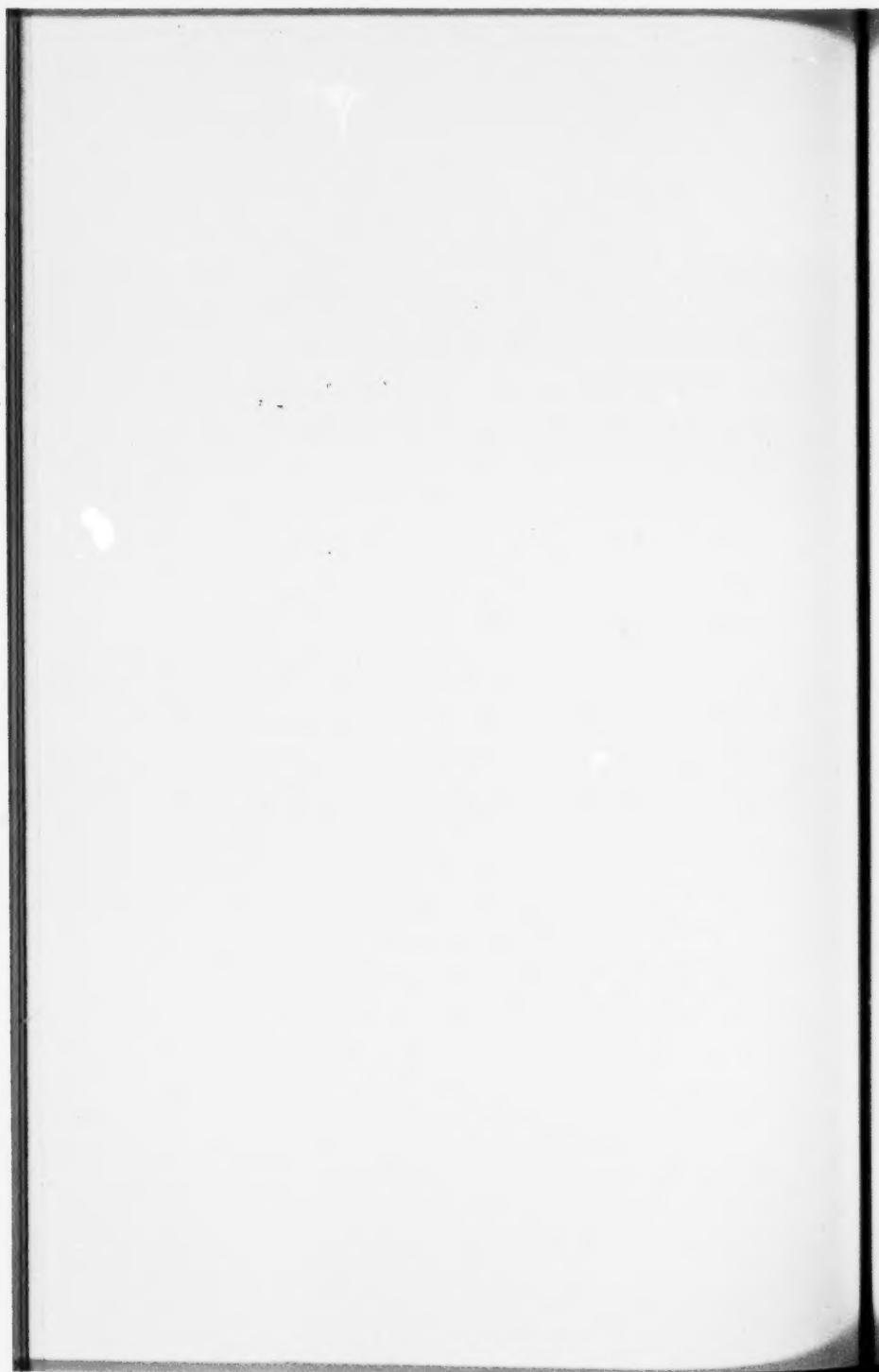
RING & MURRAY,

Attorneys for Petitioners-Appellants.



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*To The Honorable, The Chief Justice And Associate
Justices Of The Supreme Court Of The United States:*

Your petitioners, The Norstrand Corporation and Leif Norstrand, pray for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review an order of that Court in this cause filed August 4th, 1943, dismissing an appeal herein.

Summary Statement Of The Matter Involved.

On December 4th, 1942, the petitioners pleaded guilty to an information concerning violation of the Emergency Price Control Act. On December 8th, 1942 they were sentenced by the Hon. Alfred C. Coxe, United States District Judge, to pay fines "jointly and severally" of Five Thousand (\$5,000) Dollars, Sixteen Hundred (\$1600) Dollars,

and Five Hundred (\$500) Dollars, totaling Seventy-one Hundred (\$7100) Dollars; on March 8th, 1943, within the time permitted by the rules of the Southern District of New York, petitioners filed a petition for a reconsideration or rehearing of the aforesaid judgment chiefly on the ground that false statements had knowingly been made by the Assistant District Attorney to induce the Court to fine the petitioners the additional Sixty-six Hundred (\$6600) Dollars. The petition, after some consideration, was denied April 19, 1943 by Hon. Alfred C. Coxe. On April 24th, 1943 the petitioners filed a Notice of Appeal from the sentence which had been imposed on December 8th, 1942 and from the denial of the petition for reconsideration of the judgment. On May 4th, 1943, the petitioners filed in the District Court an Assignment of Errors in connection with their Notice of Appeal.

Thereafter, the respondent moved to dismiss the appeal

- (1) ". . . because in so far as the appeal is taken from the sentence, more than five days elapsed from the date of sentence to the filing of a notice of appeal, . . ."

and

- (2) ". . . in any event the sentence was upon a plea of guilty, . . ."

and

- (3) ". . . in so far as the appeal is from the denial of a motion to reduce the amount of the fine, the determination of the lower Court was within its discretion and is not appealable."

In view of the motion, the time to file the record on appeal was extended pending the outcome of the motion.

There was no record before the Circuit Court of Appeals other than the Notice of Motion and a statement of the Clerk, a copy each of which is printed in the appendix herein and which sets forth the foregoing dates.

On July 19, 1943 on oral argument, the judges of the Circuit Court of Appeals conceded that consideration of a motion for rehearing, which was timely when made, extended the time to appeal from the original judgment of sentence.

With respect to the third ground, petitioners' counsel stated that it was intended to show abuse of discretion which could not be ruled upon until the record was made and shown to the Court.

After oral argument, the Court granted the motion without any opinion and with the endorsement of the single word "granted" on the motion papers. The presiding judge stated that since there was a plea of guilty, the appeal could relate only to the sentence over which the Court had no jurisdiction and granted the motion to dismiss.

Petitioners' point is that on that record alone it was improper to dismiss the appeal.

The Notice of Appeal and Assignment of Errors, though filed in the District Court, were not before the Circuit Court of Appeals, and that Court declined the offer of counsel to file a memorandum setting forth the grounds of the appeal, etc.

The Question Raised.

The question raised is whether or not the petitioners have been denied due process and their statutory rights by the summary disposition of this appeal, and by the summary disposition of the matter in the District Court.

Jurisdiction Of The Supreme Court Of The United States In This Proceeding.

This is a criminal case finally adjudicated in the Circuit Court of Appeals of the United States for the Second Circuit, and jurisdiction of the Supreme Court of the United States to issue a Writ of Certiorari to that Court is invoked under Section 240 of the Judicial Code, Title 28, United States Code Annotated, Section 347.

Reasons Relied On For Allowance Of Writ.

The appeal in the Circuit Court of Appeals was timely because it was within five days after the entry of the order and final disposition on the petition for rehearing or reconsideration, which itself was timely (*Wayne Gas Co. v. Owens-Illinois Co.*, 300 U. S. 131, 135-138).

The fact that the petitioners pleaded guilty does not bar an appeal. The plea of guilty merely makes a trial unnecessary and leaves the petitioners in the same position to appeal on all other grounds as if there had been a trial and conviction.

The petitioners had a right to show abuse of discretion and unless and until the record is made and submitted to the Circuit Court of Appeals, no ruling could be made. Counsel should not be required by the Court to state in substance the nature of the appeal and have such oral statement take the place of a complete record.

Petitioners are aware that the judge has discretion in fixing a fine and that there is no appeal from a fine on the ground that it is excessive and that is not the nature of this appeal. The petitioners have the right to the free, unbiased judgment of the District Court and particularly have the right to the free judgment of the District Court exercised without bias which might be created by any false

statements on the part of the Assistant District Attorney. If the Assistant District Attorney had stated that the petitioners were third or fourth offenders such statement would no doubt prejudice the Court and the petitioners would have a right to deny such issue and have a fair trial.

The petitioners pleaded guilty upon the representation of the Assistant District Attorney that the information as filed covered only misdemeanors, and that no substantial punishment would be requested because these defendants were not the principal defendants which the government sought to prosecute.

The District Attorney requested a fine of One Thousand (\$1,000) Dollars but the Court fined the defendants "jointly and severally" Five Hundred (\$500) Dollars.

Thereafter, the Assistant District Attorney stated to the Court that the defendants had made an illegal profit of Sixty-six Hundred (\$6600) Dollars, that the defendants' counsel had so agreed (which is denied), and that the individual defendant was the ringleader for a gang of conspirators guilty of a criminal conspiracy, and requested a further fine of Sixty-six Hundred (\$6600) Dollars "jointly and severally" making a total fine of Seventy-one Hundred (\$7100) Dollars. The defendants sought reconsideration on the ground that they denied any such profit or any agreement as to such profit, or any conspiracy, and asked for an opportunity to offer testimony to disprove such prejudicial statements.

The memorandum denying the petition for rehearing stated:

"Motion denied. The questions now raised were all considered at the trial of sentence.

Alfred C. Coxe."

There was no trial of sentence. After fixing a fine of Five Hundred (\$500) Dollars, the District Court Judge then said in substance:

"Now we come to the profits."

When the petitioner denied any profit, the District Court Judge said:

"You mean you blew it."

and added in substance:

"I'll fine you in addition \$6600 jointly and severally to cover the profit."

Upon request of the Assistant District Attorney, the fine was broken down to \$5,000 and \$1,600 on separate counts because by law a fine is limited to \$5,000 for any one offense. The statements made by the Assistant District Attorney were false and are known by him to be false. That they were prejudicial is shown by the fact that the Court specifically relied on them in fixing the additional fine.

When all facts are brought out, it is doubtful if these petitioners were even technically guilty of a violation of the law and they would not have pleaded guilty but for the representations of the Assistant District Attorney. They pleaded guilty only on the representations of mild treatment, it appearing that that would be less expensive than a defense and the lengthy accounting involved.

Having been induced to plead guilty by the false representations of the Assistant District Attorney, as to the position they intended to take, the petitioners seek the right to appeal on all grounds available as set forth in the Notice of Appeal and Assignment of Errors printed in the appendix hereto.

The petitioners' position is that they had a right to deny and have a trial with respect to every statement made by the Assistant District Attorney to the Court which was not a part of the information to which the petitioners pleaded guilty; which was made to the Court to influence its judgment; and which was made with the intention that it be relied upon by the Court.

CONCLUSION.

For the foregoing reasons, the petitioners pray that this petition for a Writ of Certiorari be granted, and since there was no record in the Circuit Court of Appeals other than the Notice of Motion and statement of the Clerk, copies of which are printed herein, that, upon the granting of the Writ, this Court, without further hearing, set aside the summary dismissal of the appeal in the Circuit Court of Appeals, with leave to the petitioners to file the record in that Court, and have their appeal heard in that Court in accordance with law.

LEIF B. NORSTRAND,
NORSTRAND CORPORATION,
By RING & MURRAY,
Attorneys for Petitioners.

New York City,
August 31, 1943.